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In the Supreme Court of the United States.

OCTOBER TERM, 1968.

No. 463.

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

WYMAN-GORDON COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR WYMAN-GORDON COMPANY.

Opinions Below.

The opinion of the Court of Appeals (A. 109-118) is reported at 397 F. 2d 394 (Appendix, p. 49). The opinion of the District Court (A. 101-106) is reported at 270 F. Supp. 280. The decision of the Board's Regional Director, out of which the instant case arose (A. 9-11, 29-34), is not officially reported.

Jurisdiction.

The judgment of the Court of Appeals was entered on June 12, 1968 (A. 119). The petition for a writ of certiorari was filed on August 30, 1968, and was granted on

November 12, 1968 (A. 120). The jurisdiction of the Court rests on 28 U.S.C. § 1254(1).

Statutes Involved.

The relevant statutes are the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), and the Administrative Procedure Act, as amended (60 Stat. 257, 80 Stat. 381, 81 Stat. 54, 5 U.S.C. 551 *et seq.*).

Questions Presented.

(1) Whether the *Excelsior* rule is invalid because the National Labor Relations Board, in promulgating it, failed to comply with the provisions of the Administrative Procedure Act.

(2) Whether, under Section 11 of the National Labor Relations Act, the Board has power to subpoena the names and addresses of employees and the District Courts have jurisdiction to enforce such subpoenas where the information sought is neither "evidence" nor "testimony" as required by that Act.

(3) Whether, regardless of its procedural infirmities, the *Excelsior* rule is invalid as a matter of substantive law.

(*a*) Whether the *per se* rule announced in *Excelsior* is invalid because it is contrary to the decisions of the Courts, including this Court.

(*b*) Whether the *Excelsior* rule is illegal in that it promotes an invalid dual standard between employers and unions.

(*c*) Whether the *Excelsior* rule violates Section 8(a)(2) and Section 302 of the National Labor Relations Act, as amended.

(*d*) Whether the *Excelsior* rule is invalid because it violates the constitutionally protected right of privacy of the employees.

(4) Whether the *Excelsior* rule is in any event inapplicable to the present case inasmuch as the unions had adequate access to the employees, their names and their home addresses.

Statement of Facts.

On July 12, 1966, the International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO (hereinafter referred to as the "Boilermakers"), filed a petition with the First Region of the Board, claiming that they represented a majority of the Company's employees and requesting that an election be held by the Board to ascertain whether or not they did, in fact, so represent a majority (A. 8).

On August 26, 1966, a formal hearing was held on the Boilermakers' petition; and at this hearing the United Steelworkers of America, AFL-CIO (hereinafter referred to as the "Steelworkers"), intervened (A. 9). On September 6, 1966, the Regional Director of the First Region directed that an election be held to determine whether the employees of the Company desired to be represented by the Boilermakers, by the Steelworkers or by neither union (A. 9-11).

During the course of the hearing on August 26 the Company, by counsel, advised the Board that in its opinion the requirements of the *Excelsior* case were invalid and that the Board was without justification to require the Company to produce a list of the names *and addresses* of its employees wherein the sole purpose of supplying such a

list was that the list could be transmitted to the unions to aid and abet them in organizing the Company's employees.

Pursuant to the direction of election, an election was held on September 29, resulting in the following tally of ballots (A. 30):

Approximate number of eligible voters	1,750
Void ballots	10
Votes cast for petitioner	226
Votes cast for intervenor	555
Votes cast against participating labor organizations	903
Valid votes counted	1,684
Challenged ballots	6
Valid votes counted plus challenged ballots	1,690

Thereafter, within the prescribed time limitation, both the Steelworkers and the Boilermakers filed objections to the election, based upon the Company's failure to comply with the *Excelsior* rule. On October 19, 1966, the Regional Director upheld these objections (A. 29-34).

Thereafter the Board denied the Company's request for a review of the Regional Director's findings on these objections (A. 35). Finally, on December 29, 1966, the Board issued its subpoena requiring the Company to produce the aforementioned list of names and addresses of its employees (A. 38-39).

When the Company refused to comply with the subpoena, the Board brought action in the United States District Court for the District of Massachusetts to enforce the subpoena, or, in the alternative, it sought a mandatory injunction requiring compliance with the *Excelsior* rule (A. 3-7).

The District Court held that the *Excelsior* rule was a valid rule, and, in accordance with this opinion, enforced the Board's subpoena (A. 101-106). On appeal to the United States Court of Appeals for the First Circuit the Court found that the *Excelsior* rule was invalid, since it was a substantive rule and it was not promulgated in accordance with the provisions of the Administrative Procedure Act.

Argument.

Introduction and Summary.

In 1966 the National Labor Relations Board established a new rule, providing that in all future elections held pursuant to Section 9(c) of the Act the employer would be required to furnish a list of the names and addresses of all its employees within seven days after a consent election had been agreed upon or the Board had ordered the election, and that no election could be held for a period of ten days after the employer had submitted such a list (*Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236). In reaching this decision the Board stated that it would not apply this new rule to the case it then had under consideration, *i.e.*, *Excelsior*, but would make it applicable thirty days following the *Excelsior* decision to all then pending and future election proceedings. The Court of Appeals below found that, in adopting the *Excelsior* rule, the Board had not decided the case between one party and another party, but, in effect, had decided the case in one way and used this decision as a vehicle to promote a prospective rule of substantive nature. The Court below, in commenting on other facets of the case, made gratuitous statements, which are purely *dicta*, as to the substantive nature of the Company's other arguments. However, it specifically refrained from

ruling on any aspect of the case other than the Board's failure to comply with the Administrative Procedure Act.

It is the purpose of this brief to persuade this Court that the Court below correctly set aside the *Excelsior* rule because of the Board's failure to comply with the Administrative Procedure Act, and, in the alternative, to consider and rule upon respondent's other arguments urging the invalidation of the *Excelsior* rule. In the event that the Court declines to consider the other remaining substantive arguments against *Excelsior*, we request this Court to remand the case to the Court of Appeals for determination of the substantive arguments urging the invalidation of the *Excelsior* rule.

I.

The Excelsior Rule is Invalid because the National Labor Relations Board, in Promulgating it, Failed to Comply with the Provisions of the Administrative Procedure Act (5 U.S.C. § 551 *et seq.*)

The Administrative Procedure Act requires an administrative agency to publish notice of a proposed rule in the Federal Register, 5 U.S.C. § 553(b), and to give all interested persons an opportunity to present their views of the proposed rule, 5 U.S.C. § 553(c). Further, in Section 552(a)(1)(D) the Act defines the nature of rules which must be published, and upon which a public hearing must have been held, as including "substantive rules of general applicability."

Section 6 of the National Labor Relations Act, 29 U.S.C. § 156, provides:

> "The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and

regulations as may be necessary to carry out the provisions of this subchapter."

The Administrative Procedure Act defines "rule" and "rule making" as follows:

> "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . ." 5 U.S.C. § 551(4).
>
> "rule making" means agency process for formulating, amending, or repealing a rule . . ." 5 U.S.C. § 551(5).

The method by which rules must be promulgated by administrative agencies is set forth in 5 U.S.C. § 553:

> "(b) General notice of proposed rule making shall be published in the Federal Register . . . The notice shall include—
>
> "(1) a statement of the time, place, and nature of public rule making proceedings;
>
> "(2) reference to the legal authority under which the rule is proposed; and
>
> "(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. . . .
>
> "(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the ruling making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. . . .

"(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date . . .

"(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule."

In addition, 5 U.S.C. § 552(a)(1) provides:

"Each agency shall separately state and currently publish in the Federal Register . . . (D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency . . ."

Clearly, in promulgating the *Excelsior* rule the Board did not follow the required procedure of the Administrative Procedure Act. Yet, in its *Excelsior* decision, the Board recognized the importance of its proposed rule, as indicated by the following statement:

"On April 2, 1965, the National Labor Relations Board, having determined that the Employer's denial of the Petitioner's request for the names and addresses of employees eligible to vote in the election in these two cases presented *a question of substantial importance in the administration of the National Labor Relations Act* . . ." 156 N.L.R.B. at 1238. (Emphasis added.)

Realizing the "substantial importance" of the issues involved, the Board invited certain "interested parties" to file *amicus* briefs. It is interesting to review the "inter-

ested parties." In its *Excelsior* decision the Board stated, at page 1238:

> "The Board also invited certain interested parties to file briefs *amicus curiae* and to participate in oral argument. This invitation was accepted by: the Chamber of Commerce of the United States; American Federation of Labor and Congress of Industrial Organizations; International Union of Electrical, Radio and Machine Workers, AFL-CIO; and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW-AFL-CIO. The National Association of Manufacturers, Retail Clerks International Association, AFL-CIO, and Textile Workers Union of America, AFL-CIO, filed briefs but did not participate in the argument. The International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America participated in the argument but did not file a brief."

Thus, on the Board's own admission of paying lip service to the Administrative Procedure Act, the Board invited participation in the *Excelsior* case by two trade associations representing management and six unions representing labor. The selectivity of the Board's invitees shows a biased approach to the problem, which constitutes an unwarranted and unjustified rejection of the principles of fair treatment of all interested parties under the provisions of the Administrative Procedure Act.

There can be no dispute that the *Excelsior* rule is a "rule" as defined by the Administrative Procedure Act. Certainly it is "an agency statement of general . . . applicability and future effect designed to implement, interpret,

or prescribe law or policy" 5 U.S.C. § 551(4). It is just as clear that the Board did not comply with the notice, hearing or publication requirements of that Act. The fact that the Board invited a limited group of persons to submit their views, that it announced a sweeping rule applicable to all future elections and that it did not apply it to the facts or parties before it clearly indicates that the Board knew it was making a rule. In so doing, it circumvented the requirements of the Administrative Procedure Act. It is submitted that this the Board cannot do and consequently the *Excelsior* rule is invalid.

The Board in its petition for certiorari and in its brief before this Court lays great stress on the ruling of this Court in *Securities & Exchange Commission* v. *Chenery Corporation*, 332 U.S. 194 (1947). It is respectfully submitted that the Board's analysis of the issues of the *Chenery* case is completely inappropriate. In that case this Court approved of the establishment of a new rule by the adjudicative method rather than by formal rule-making; but, as the Court of Appeals below pointed out, the decision in the *Chenery* case was between party and party. For this reason alone, *Chenery* is not a substantive precedent upon which the Board can premise its *Excelsior* decision. In the instant case the Court of Appeals disposed of the Board's reliance on *Chenery* in the following language:

> "In *Excelsior*, however, the Board did not decide a case between party and party, or, more exactly, it decided a case one way, and took occasion to lay down a future rule the other way. *Chenery* in no fashion suggests approval of this. On the contrary, to the extent the Board was not deciding a case, this is precisely where Congress had instructed it as to the procedure

it should adopt. The Board has chosen to disregard Congress." (Footnote omitted.)

Wyman-Gordon Co. v. *National Labor Relations Board,* 397 F. 2d 394, 397 (1968).

Although it may be generally true that the choice between rule-making and adjudication is primarily within the discretion of the administrative agency, it is equally true that, once the agency determines which course it will adopt, it must adhere to the provisions of law relating to that method of conduct. Thus a most important question here is whether an administrative agency can promulgate a rule of general applicability prescribing a course of conduct for the future without complying with the Administrative Procedure Act merely by announcing the rule in the course of an adjudicatory proceeding to which the rule does not apply. Certainly *Chenery* does not permit this.

At this point it is pertinent to refer briefly to the legislative history of the Administrative Procedure Act. In Report No. 752 of the Committee on the Judiciary, 79th Congress, 1st Session, in considering the Act, it is stated:

> "The specification of activities that are involved in rule making is included in order to comprehend them beyond any possible question. They are defined as rules to the extent that, whether of general or particular applicability, they formally prescribe a course of conduct for the future rather than merely pronounced existing rights or liabilities."

In describing the type of "rule" for which the Administrative Procedure Act required publication and a hearing,

Senator McCarran stated on the Senate Floor that the term "rule"—

> "is defined as any agency statement of general applicability designed to implement, interpret, or prescribe law, policy, organization, procedure or practice requirements." Senate Doc. 248, 79 Congress, 2d Sess., p. 306, Legislative History of the Administrative Procedure Act.

There have been, of recent date, numerous cases in which various Courts of Appeals, while upholding the establishment of new rules on an adjudicatory basis rather than on a rule-making basis, have increasingly criticized the Board for its failure to promulgate such rules under the Administrative Procedure Act. *Cf. National Labor Relations Board* v. *A.P.W. Products Co.*, 316 F. 2d 899, 905 (1963); *National Labor Relations Board* v. *Majestic Weaving Co., Inc.*, 355 F. 2d 854, 860 (1966); *National Labor Relations Board* v. *Penn Cork & Closures, Inc.*, 376 F. 2d 52, 57, cert. den. sub nom. *District Lodge No. 15* v. *National Labor Relations Board*, 389 U.S. 843 (1967). In *National Labor Relations Board* v. *Penn Cork & Closures, Inc., supra*, at page 57, the Court stated:

> "It would indeed have been far better if the Board had conducted a rule-making proceeding under § 4 of the APA . . . Regrettable as is the Board's continued failure to use its rule-making powers . . . we cannot say that, on the facts of this case . . . its choice to proceed by the adjudicative route was beyond its power."

Many legal commentators have expressed similar dissatisfaction with the Board and other administrative agen-

cies for failure to use their rule-making powers as set forth in the Administrative Procedure Act. See, generally, Peck, *The Atrophied Rule-Making Powers of the National Labor Relations Board,* 70 Yale L.J. 729 (1961); Friendly, *The Federal Administrative Agencies: The Need for Better Definitions of Standards,* 145-147 (1962); 1 Davis, *Administrative Law Treatise,* § 6.13 (1965 pocket part); and Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy,* 78 Harv. L. Rev. 921 (1965).

These cases and articles express regret that the Board, and other agencies, have failed to use their rule-making powers when it would be appropriate and advisable to do so. But, as the Court noted in *Penn Cork, on the facts of those cases,* the Board had the power to proceed by adjudication. However, it is submitted that on the facts of *this* case the Board did not have such power. It is apparent from an objective evaluation of the action taken by the Board in *Excelsior* that the Board chose to broaden its investigation and to engage in general rule-making. It was at this point that the Board was bound to take the necessary, and relatively simple, step of conforming its conduct to the notice, hearing and publication requirements of the Administrative Procedure Act.

In a decision involving a situation similar to the instant case, this Court found a ruling of the Interstate Commerce Commission invalid for failure to comply with the Administrative Procedure Act. See *Chicago, Burlington & Quincy Railroad Co.* v. *United States,* 242 F. Supp. 414, affirmed per curiam sub nom. *Chicago & North Western Railway Co.* v. *Chicago, Burlington & Quincy Railroad Co.,* 382 U.S. 422 (1966). In that case the lower Court had held that the promulgation of a rule for future application, though done in the course of an adjudicatory proceeding,

constituted rule-making, and could not be done without compliance with the publication, notice and hearing requirements of the Administrative Procedure Act. Because the *Excelsior* rule is likewise invalid, the Respondent is under no duty to comply with it. See *Hotch* v. *United States*, 212 F. 2d 280 (1954); *Gonzalez* v. *Freeman*, 334 F. 2d 570 (1964); *Seaboard World Airlines, Inc.*, v. *Gronouski*, 230 F. Supp. 44 (1964).

At this point it is proper to attempt to evaluate the Board's refusal to comply with the provisions of the Administrative Procedure Act in nearly all areas of rule-making. For example, Professor Peck indicates that, during the period 1954 through 1959, the Board, in numerous instances, changed the dollar jurisdictional amount above which it would assert jurisdiction of business affecting commerce solely by means of press releases. Peck, *supra*, pp. 736-737, nn. 32-41. Certainly, it is clear that, where the Board makes such a change by means of a press release, employers and unions have little or no recourse to the Courts to seek review of the Board's arbitrary and often capricious approach to the mandate of Congress, in enacting the National Labor Relations Act, that the Board should seek stability in labor-management relations. The effect of such an approach is completely to unstabilize labor-management relations so that neither unions nor management can know from one day to the next whether their actions are legal and valid.

In regard to these dollar jurisdictional changes over the years, the Board has completely ignored Section 14(c)(1) of the Act, which provides:

> "The Board, in its discretion, may, *by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act*, decline to assert jurisdic-

> tion over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: *Provided,* That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959." (Emphasis added.)

Concerning the *Excelsior* rule, just as with the press-release rule changes, the Board has been unable to point to any specific provision of the Act which authorizes or even permits the action it has taken. Indeed, it is submitted that the Board cannot find authorization for the promulgation of the *Excelsior* rule in any provision of the Act itself.

As stated in 1 Davis, *Administrative Law Treatise,* § 6.13, at p. 149 (1965 pocket part):

> "When the rule-making element in an adjudication becomes the dominant element to such an extent that concern for the particular adjudication almost disappears, the Board may be in a very deep sense, not merely in a technical sense, violating both Secs. 3 and 4 of the Administrative Procedure Act, because the result then involves procedural injustice . . ."

What the Board did in *Excelsior* is certainly procedural injustice of a most offensive character. It has practically succeeded in insulating itself from legitimate challenge from any quarter.

The Board seeks to find justification for its notorious failure to follow the rule-making procedures of the Administrative Procedure Act because "the cumbersome procedure of amending formal rules would impede 'the law's

ability to respond quickly and accurately to changing industrial practices'" (Board's Brief, p. 15, and note 12).

It is submitted that, if the Board were to make more frequent use of its rule-making powers, it would greatly stabilize industrial practices to the convenience of employees, unions, employers and the general public, whose varied interests Congress has entrusted to the Board for stabilization.

A review of the *Excelsior* decision itself clearly belies the fact that adjudication rather than rule-making permits quick response by the Board to changing situations. In *Excelsior* an election was held on December 6, 1963. In its companion case, *K. L. Kellogg & Sons*, an election was held between May 15 and 28, 1964. On April 2, 1965, the Board consolidated these two cases and invited special interested parties to present their views on the matter of whether or not names and addresses should be required in future Board elections. The Board received briefs from these parties, and on May 20, 1965, held oral argument on the matter. Finally, on February 4, 1966, the Board issued its decision in *Excelsior*. Thus, in the *Excelsior* case, the Board's decision came down two years and two months after the election, and in the *Kellogg* case just short of two years.

The Board finds further justification for the establishment of new rules and regulations by adjudication rather than by rule-making on the ground that the Board itself cannot initiate its own processes. While it is true that the Board cannot initiate an unfair labor practice charge under Section 8 of the Act or a representation proceeding under Section 9 of the Act, this statement is absolutely false when one considers the provisions of Section 6 of the Act, whereby the Board is specifically authorized by Congress "*from time to time to make, amend, and rescind, in the manner*

prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this Act.''

In its failure to utilize its rule-making authority in *Excelsior* and in the other cases cited *supra*, the Board has completely ignored the mandate of Congress.

II.

THE BOARD LACKS POWER TO SUBPOENA THE NAMES AND ADDRESSES OF EMPLOYEES, AND THE DISTRICT COURTS ARE WITHOUT JURISDICTION TO ENFORCE SUCH SUBPOENAS, SINCE THE INFORMATION SOUGHT IS NEITHER ''EVIDENCE'' NOR ''TESTIMONY'' AS REQUIRED BY SECTION 11 OF THE NATIONAL LABOR RELATIONS ACT, 29 U.S.C. § 161.

Section 11(1) of the National Labor Relations Act, 29 U.S.C. § 161(1), clearly limits the scope of the Board's subpoena power to ''evidence'' or ''testimony'' relating to a ''matter under investigation or in question.'' Similarly, Section 11(2) of the Act, 29 U.S.C. § 161(2), confers jurisdiction on the District Courts to enforce a Board subpoena, but again this is unquestionably restricted to the production of ''evidence'' or giving of ''testimony'' ''touching the matter under investigation or in question.''

Despite the plain meaning of this statutory language, the Board contends, and rather amazingly it has received support from some Courts, that it has the power to issue subpoenas, which the District Courts have power to enforce, seeking the names and addresses of employees solely for the purpose of turning them over to unions for use in election campaigns. It is submitted that this contention is without foundation, and, unless the Board can establish the necessity of the production of evidence or the submission of testimony touching the matter under investigation

in order to resolve an issue before it, the District Court is without authority to enforce the Board's subpoena. See *Federal Trade Commission* v. *American Tobacco Co.*, 264 U.S. 298 (1924); *Goodyear Tire & Rubber Co.* v. *National Labor Relations Board*, 122 F. 2d 450 (1941); *Cudahy Packing Co.* v. *National Labor Relations Board*, 117 F. 2d 692 (1941).

The Board has clearly indicated that the sole purpose of requiring the *Excelsior* list is for transmittal of these lists to the union or unions involved in a representation case. Where this is the avowed purpose of requiring the Respondent to supply such a list, it is inconceivable that the Board or this Court can find justification for the production of such lists on the ground that they constitute evidence or testimony.

> "Evidence is a demonstration of a fact; it signifies that which demonstrates, makes clear, or ascertains the truth of the fact or point in issue, either on the one side or on the other. In legal acception, the term 'evidence' includes all the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved." 31 C.J.S., "Evidence," § 2.

The gravamen of this situation is that the Board misconstrues its statutory authority under Section 11 and misconstrues the type of information to which it is entitled under the provisions of the Act.

In *Excelsior* the Board goes to great length in attempting to equate the right of a stockholder to obtain the names and addresses of fellow stockholders in the corporation. It finds in this area justification for its *Excelsior* decision. It has been acknowledged by the Courts, including the

Supreme Court of the United States, that recognition must be given to the Board's "expertise" in matters pertaining to labor management relations. However, the Board's approach and argument, based upon a stockholder relationship, belies any expertise of the Board in the field of corporate law. The reason that an individual stockholder may obtain a list of all stockholders in the corporation is based primarily upon the fact that a stockholder, no matter how small his holdings, is a partial owner of the corporation and as such has a right, both under common law and under statutory law, to know who his fellow stockholders are and to address them on any matter which he feels is of personal interest to them.

Again, the Board in *Excelsior* seeks sustenance to support its position on the ground that in a national, state or local election a candidate for office may secure the names and addresses of all registered voters. Presumably this is in order that the candidate can address the voters by mail, by telephone, or by personal visits. Going further, the Board again seeks support in the fact that a candidate for a union office is entitled to have the union distribute his personal campaign literature to all members. The Board's argument on both of these two issues is completely naive and belies an "expertise" of the Board in these areas. The availability of a voters' list in a public election is a statutory right, and the requirement that a candidate for office in a union have a right to have the union distribute his literature for him is a statutory right.

In the present situation, the Board has not and cannot cite any provision in the Act which requires an employer to supply the information here requested by the Board, or indeed permits the Board to request such information.

The Board completely fails to understand or acknowledge the true nature of a subpoena and why subpoenas are nec-

essary and vital. A subpoena has been described in the following language:

> "A 'subpoena' . . . is process, or a writ . . . for the purpose of compelling the attendance of a person whom it is desired to use as a witness . . . A writ which does not cause a witness to . . . give testimony . . . is not a subpoena." 97 C.J.S., "Witnesses," § 20.

> "Generally speaking, a subpoena duces tecum may be issued to compel the production of any proper documentary evidence, such as books, papers, documents, accounts and the like, which is desired for the proof of an alleged fact relevant to the issue before the Court or officer issuing the subpoena . . ." 97 C.J.S., "Witnesses," § 25e.

The Board has not urged and cannot urge upon this Court that the information they are presently seeking comes within the foregoing definition of a subpoena or the purposes for which a subpoena may be issued.

There can be no issue as to the purpose for which the Board seeks the names and addresses of the Company's employees. It is clearly set forth in Board's Exhibit B (A. 11), in the following language:

> "An election eligibility list, containing the names and addresses of all the eligible voters, must be filed with the Regional Director within seven (7) days of the date of this Decision and Direction of Election. The Regional Director shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office, John F. Kennedy Federal Building, Cambridge and New Sudbury Streets, Boston, Massachusetts 02203, on or

before Sept. 13, 1966. Under Board directives, no extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed." *Excelsior Underwear, Inc.*, 156 N.L.R.B. No. 111.

There is no controversy involved which the Board seeks to resolve by its subpoena. There is no information that the Board seeks to obtain to assist the Board in the conduct of the election. As will be pointed out below, the Board's argument in regard to minimizing challenges during the course of the election is, in this proceeding, without foundation in fact. The Board's 32d Annual Report substantiates the fallacy of minimizing challenges by use of the lists (*infra*, p. 36). Section 11 of the Act, upon which the Board bases its alleged claim to jurisdiction for itself and for the Court, reads in part as follows:

> "The Board . . . shall at all reasonable times have access to . . . evidence. . . . The Board . . . shall upon application . . . issue . . . subpoenas requiring the attendance and testimony of witnesses or the production of . . . evidence . . ."

Section 11(1) of the Act then discusses the areas in which the Board may properly issue a subpoena. In each instance, however, the right to issue a subpoena is based upon the necessity of the Board's ascertaining "evidence" or the necessity of the "production of evidence before the Board." Section 11(2), which grants District Courts "jurisdiction" to enforce Board subpoenas, again states em-

phatically that in the enforcement of such subpoenas the purpose is to afford the Board the right to produce "evidence" or to obtain "testimony."

The list which the Board is seeking here does not come, under any stretch of the imagination, within the terms of evidence or testimony.

The information which the Board solicits cannot aid or assist the Board in the determination of whether or not there is a question affecting interstate commerce. The sole purpose for which the Board seeks the *Excelsior* list is to aid and abet the unions in their attempts to seek a representative status of the Company's employees.

If the Board feels that the *Excelsior* lists are appropriate and necessary to the conduct of an election under the Act, its recourse is to the Congress of the United States and not to the Courts.

Congress could easily have granted the Board the subpoena power which the Board here contends it has. But Congress chose not to do so. Any doubt that could exist as to this is clearly dispelled by an investigation of the legislative history of Section 11. Notably, a preliminary version of the Act gave the Board the power to compel production of material which it deemed "relevant or material to the inquiry." S. 2926, 73d Cong., 2d Sess., § 208(1) (1934). However, the statute as enacted limited this investigatory power to "evidence" or "testimony." See also I Leg. His. of N.L.R.B. 1108 (1935); II Leg. His. of N.L.R.B. 2932 (1935).

Moreover, where Congress has intended to grant more extensive investigatory powers to administrative agencies, it has done so most clearly. For example, the Railway Labor Act, which predates the National Labor Relations Act, grants the National Mediation Board access to books and records "to obtain and utilize such information as may be

deemed necessary by it to carry out the purposes and provisions of this paragraph." 45 U.S.C. § 152.

This language is clearly distinguishable from, and much broader than, that of Section 11, with which we are here concerned. Section 11 provides, in part, that the Board shall—

> "have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question."

Thus, whereas the Railway Labor Act gives the National Mediation Board the power "to obtain and utilize" any information it deems necessary, Section 11 permits the National Labor Relations Board only to examine or copy evidence relating to a matter under investigation or in question.

From this it is clear that Congress intended to, and did, limit the Board's subpoena power. Congress could have used the same type of language that it had used in the Railway Labor Act or that had been originally proposed with respect to Section 11 of the National Labor Relations Act. The fact that it decided to use more restrictive language is conclusive on the Board's argument here and disposes of it.

The District Court, the Board assumes, is to be nothing but a rubber stamp that must automatically enforce its subpoena. The Board gives no consideration to the fact that it is seeking equitable relief. It ignores the fact that, in equity, it is asking the Court to exercise its discretion. While it is the Company's position that the District Court had no jurisdiction based upon the foregoing statutory language to support the complaint, since neither testimony nor evidence is involved, it is still within the Court's discretion

to determine whether or not it should in propriety sustain the Board's request. It is submitted that it should not.

III.

Regardless of its Procedural Infirmities, the Excelsior Rule is Invalid as a Matter of Substantive Law.

There are compelling reasons for this Court to consider the entire case on its merits. Such a review will resolve the many issues presented by the extensive, often conflicting, litigation that has been generated by the *Excelsior* rule. In addition to the First Circuit, five other Courts of Appeals and numerous District Courts have been called upon to consider various of the contentions raised by the Respondent here. A brief summary of these decisions will indicate how differently, both quantitatively and qualitatively, these Courts have treated the questions involved. The resultant confusion, dissatisfaction and uncertainty highlight the necessity that these issues be resolved.

The following cases are presented here only to indicate the nature of the present situation. Other sections of this Brief present the Respondent's arguments and contentions concerning the issues discussed in these cases.

In *National Labor Relations Board* v. *Hanes Hosiery Division-Hanes Corp.*, 384 F. 2d 188 (1967), cert. den. 390 U.S. 950 (1968), the Court of Appeals held that an *Excelsior* list was "'evidence' of a 'matter under investigation or in question.'" *Id.*, at 191. However, the Court did not discuss what might constitute "evidence," nor did it discuss the question of the validity of the *Excelsior* rule. Other contentions raised by the employer were passed off quite summarily.

In *National Labor Relations Board* v. *Rohlen*, 385 F. 2d 52 (1967), the Court rejected the employer's challenge of

the validity of the *Excelsior* rule, simply on the basis of the *Excelsior* decision itself. The Court enforced the Board's subpoena, saying that, so long as the material sought touches a matter under investigation, it does not matter that it is not "evidence" in the generally accepted sense of that term.

Howell Refining Co. v. *National Labor Relations Board*, 400 F. 2d 213 (1968), primarily concerned a petition by the employer to set aside an election. The Court, merely citing *Hanes Hosiery* and *Rohlen, supra*, said that the *Excelsior* rule was a valid exercise of the Board's power, and dismissed the employer's contention to the contrary. In a footnote, which was pure *dicta*, and without benefit of briefs or arguments on the point, the Court noted its disagreement with *Wyman-Gordon*. *Id.*, at 216, n. 8.

The Second Circuit, in *National Labor Relations Board* v. *Beech-Nut Life Savers*, F. 2d , 69 L.R.R.M. 2846 (1968), quite narrowly construed the employer's contention that the *Excelsior* rule was improperly promulgated, and held that it did not violate the Administrative Procedure Act. Relying on *Hanes Hosiery* and *Rohlen, supra*, the Court said the Board may subpoena data which are "relevant and helpful," regardless of the fact that they are not "evidence" as that term is generally used.

Some of these issues were again raised in *British Auto Parts, Inc.*, v. *National Labor Relations Board* (together with *Teledyne, Inc.*, v. *National Labor Relations Board*), F. 2d , 70 L.R.R.M. 2065 (9th Cir. 1968). There the Court disposed of most of the employers' contentions, relying on *Hanes Hosiery* and *Rohlen, supra*. It also disagreed with the contention that the Board acted improperly in failing to comply with the Administrative Procedure Act, and, again citing the cases mentioned above, sustained the Board's power to subpoena the *Excelsior* list.

The most recent Court of Appeals decision in this area is *Groendyke Transport, Inc.*, v. *Davis*, . F. 2d , 70 L.R.R.M. 2268 (5th Cir. 1969). There the Court simply held that the District Court, in enjoining enforcement of the Board's subpoena, erroneously relied on *Wyman-Gordon, supra,* since it (the Fifth Circuit) later approved the *Excelsior* rule in *Howell Refining, supra.*

If anything, the District Court opinions concerning the *Excelsior* rule present an even greater degree of conflict and confusion than do those of the Courts of Appeals.

In *National Labor Relations Board* v. *Wolverine Industries Division,* 64 L.R.R.M. 2187 (E.D. Mich. 1967), the Court granted enforcement of the Board's subpoena, and ruled that "evidence" under Section 11 of the Act, includes all information necessary or helpful to the Board.

A quite similar case, but one with a different result, is *National Labor Relations Board* v. *Montgomery Ward & Co.,* 64 L.R.R.M. 2299 (M.D. Fla. 1967). Here the Court denied enforcement of the Board's subpoena because it did not seek the production of "evidence" as that term is used in Section 11 of the Act, but rather sought the names and addresses of the employees merely to turn them over to the union. Moreover, the Court, as a matter of sound discretion, denied the alternative injunctive relief requested by the Board.

In *Swift & Co.* v. *Solien,* 66 L.R.R.M. 2038 (E.D. Mo. 1967), the Court denied the employer's request for an injunction, and in *National Labor Relations Board* v. *Swift & Co.,* 67 L.R.R.M. 2473 (E.D. Mo. 1967), it granted enforcement of the Board's subpoena, indicating its view that the term "evidence" as used in Section 11 of the Act includes all material which is of assistance to the Board.

National Labor Relations Board v. *Q-T Shoe Manufacturing Co., Inc.,* 279 F. Supp. 1 (1968), in which the Court

denied the relief sought by the Board, presents a most clear discussion of the meaning of "evidence" as that term is used in Section 11 of the Act. *Id.*, at 6-7. The Court concluded that the Board's subpoena was improper and unenforceable. Furthermore, it held that an injunction could be sought only after the Board has properly determined that refusal to furnish an *Excelsior* list constituted an unfair labor practice.

In *National Labor Relations Board* v. *Cone Mills Corp.*, 68 L.R.R.M. 2980 (D. S.C. 1968), the Court granted enforcement of the Board's subpoena, ruling that *Hanes Hosiery, supra,* was controlling. Therefore it engaged in little, if any, discussion of the contentions raised by the employer.

In *National Labor Relations Board* v. *Daniel Construction Co.*, 69 L.R.R.M. 2206 (D. S.C. 1968), the Court granted enforcement of the Board's subpoena, saying it was bound to do so by the decision of the chief judge of the district in *Cone Mills, supra,* and by *Hanes Hosiery, supra.* However, it limited the scope of the subpoena by allowing the union to communicate with former employees only by mail in an attempt to preserve equality between the employer and the union.

In *National Labor Relations Board* v. *J. P. Stevens & Co.*, 69 L.R.R.M. 2756 (W.D. N.C. 1968), the Court, saying it was bound by *Hanes Hosiery,* granted enforcement of the Board's subpoena. However, with respect to the contention raised by 219 employees who were allowed to intervene that furnishing the *Excelsior* list would violate their right of privacy, the Court said:

> "The real issue in this controversy is raised by the Company's 2nd Contention and the contentions of the Intervener employees that their fundamental rights would be violated if the Company is ordered to comply with the order of the Board. Its defenses raise ques-

tions of considerable merit and the arguments and briefs are most impressive in this respect." *Id.*, at 2757.

As noted above, the preceding cases have been outlined here solely to indicate the extent and nature of the confusion that exists among the various Courts that have dealt with *Excelsior*. As previously mentioned, the Respondent's position on the issues involved in these cases is presented in other parts of this Brief.

Another reason why this Court should consider the entire case stems from the well-established principle that a respondent is entitled to "urge any matter appearing in the record in support of a judgment . . ." *LeTulle* v. *Scofield*, 308 U.S. 415, 421 (1940). One of the cases most frequently cited for this proposition is *Langnes* v. *Green*, 282 U.S. 531 (1931), where the Court said:

> "In the present case, however, it is not necessary to consider this rule of practice [that the Court is not bound to consider objections to the decree below urged by a respondent who did not seek certiorari] because the respondent offers no objection to the decree of the court of appeals. In that court he attacked the decree of the district court upon . . . two grounds . . . and the circuit court of appeals sustained the attack but upon one of such grounds only. Respondent here defends that decree upon the ground upon which it was based, and, in addition, continues to urge the rejected ground, not to overthrow the decree, but to sustain it. His right to do so is beyond successful challenge . . ." (P. 538.)

Other cases recognizing the right of a respondent in certiorari to support the judgment of the lower Court on

grounds rejected by that Court include *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 560 (1931); *Stelos Co.* v. *Hosiery Motor-Mend Corp.*, 295 U.S. 237, 238-239 (1935); *Helvering* v. *Lerner Stores Corp.*, 314 U.S. 463, 466-467 (1941); and *Walling* v. *General Industries Co.*, 330 U.S. 545, 547 (1947).

This principle is not limited to issues rejected by the lower Court, but applies as well to issues that were not passed upon by that Court and even to points not raised there. In *United States* v. *Ballard*, 322 U.S. 78 (1944), the Court of Appeals reversed the convictions of the respondents and granted them a new trial. In discussing the respondents' right to sustain the judgment of the Court of Appeals, this Court observed, at page 88:

> "Respondents maintain that the reversal of the judgment of conviction was justified on other distinct grounds. The Circuit Court of Appeals did not reach those questions. Respondents may, of course, urge them here in support of the judgment of the Circuit Court of Appeals. *Langnes* v. *Green*, 282 U.S. 531, 538-539; *Story Parchment Co.* v. *Paterson Co.*, 282 U.S. 555, 560, 567-568. But since attention was centered on the issues which we have discussed, the remaining questions were not fully presented to this Court either in the briefs or oral argument. In view of these circumstances we deem it more appropriate to remand the cause to the Circuit Court of Appeals so that it may pass on the questions reserved. . . . If any questions of importance survive and are presented here, we will then have the benefit of the views of the Circuit Court of Appeals."

See also *Texarkana* v. *Arkansas Louisiana Gas Co.*, 306 U.S. 188, 198 (1939). Similarly, where the judgment below was rested upon an erroneous ground, a respondent

in certiorari may justify it on a different and valid ground. *Ryerson* v. *United States*, 312 U.S. 405, 408 (1941). And as noted above, a respondent may seek to sustain the judgment below on a ground raised for the first time in argument before this Court. *Marshall* v. *Pletz*, 317 U.S. 383, 389-390 (1943).

A. The Per-Se Rule Announced in Excelsior is Invalid because it is Contrary to the Decisions of the Courts, Including This Court.

In *Excelsior* the Board has adopted a doctrine that cannot withstand the thrust of decisions of the United States Supreme Court, presuming an imbalance of communication between an employer and the union or unions seeking to represent employees. The Board in *Excelsior* has determined that it is necessary that the unions be supplied with the names and addresses of employees.

This Court has consistently held that a union does not have, except in unusual circumstances, such a right of communication. In *National Labor Relations Board* v. *United Steelworkers of America, CIO (NuTone, Inc.)*, 357 U.S. 357 (1958), the Court clearly upheld the principle that a union does not have a statutory right under the provisions of the Act to distribute union literature on company time and on company property. In order to establish such rights, the Court held that it had to be affirmatively shown that an employer's rule barring such activity actually limited or reduced the union's ability to campaign among the employees.

> "Of course the [employer's] rules had the effect of closing off one channel of communication [to the union]; but the Taft-Hartley Act does not command that labor organizations as a matter of abstract law,

under all circumstances, be protected in the use of every possible means of reaching the minds of individual workers, nor that they are entitled to use a medium of communication simply because the employer is using it. Cf. *Bonwit Teller, Inc.*, v. *Labor Board*, 197 F. 2d 640, 646; *Labor Board* v. *F. W. Woolworth Co.*, 214 F. 2d 78, 84 (concurring opinion). No such mechanical answers will avail for the solution of this non-mechanical, complex problem in labor-management relations. If, by virtue of the location of the plant and of the facilities and resources available to the union, the opportunities for effectively reaching the employees with a pro-union message, in spite of a no-solicitation rule, are at least as great as the employer's ability to promote the legally authorized expression of his anti-union views, there is no basis for invalidating these 'otherwise valid' rules. The Board, in determining whether or not the enforcement of such a rule in the circumstances of an individual case is an unfair labor practice, may find relevant alternative channels available for communications on the right to organize. When this important issue is not even raised before the Board and no evidence bearing on it adduced, the concrete basis for appraising the significance of the employer's conduct is wanting." *Id.*, at 363-364.

Earlier, this Court had established this principle in *National Labor Relations Board* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956). There, in determining the area of assistance which an employer may or may not give to a union, the Court said:

"This is not a problem of always open or always closed doors for union organization . . . *The em-*

ployer may not affirmatively interfere with organization; the union may not always insist that the employer aid organization.'' (Emphasis added.)

Two Court of Appeals decisions are most significant and most applicable to the present situation.

In *May Department Stores Co.* v. *National Labor Relations Board*, 316 F. 2d 797 (1963), the Court of Appeals overruled a decision of the Board wherein the Board had found that a union was entitled to equal time on company property to respond to noncoercive yet strongly anti-union employer's speeches. The Court found that the Board had not established the nonaccessibility of the employees, and therefore the unusual remedy sought to be established by the Board could not stand the test of the Supreme Court decisions, *supra*.

The Court said at 801:

> ". . . neither the use of the magic word 'imbalance' nor the characterization of alternative avenues of communication as 'ineffective' . . . can give the Union a right of access which the Supreme Court of the United States has refused to recognize and which it does not possess."

In a similar vein, the Tenth Circuit, at an earlier date, denied the right of a union's access to channels of communication other than those that are normally available. *Cf. National Labor Relations Board* v. *Seamprufe, Inc.*, 222 F. 2d 858 (1955).

In affirming the *Seamprufe* approach in this attempt to rationalize an excessive right of communication, this Court, in *Babcock & Wilcox, supra*, stated at page 112:

> "It is our judgment, however, that an employer may validly post his property against nonemployee distri-

bution of union literature *if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message* and if the employer's notice or order does not discriminate against the union by allowing other distribution. In these circumstances the employer may not be compelled to allow distribution even under such reasonable regulations as the orders in these cases permit." (Emphasis added.)

The Board, in adopting *Excelsior*, established a *per se* rule which is applicable to all elections subsequent to the effective date of this rule. Without exception, the Board requires the employer to submit to it a list of names of all employees within seven days and refuses to permit an election to be held in less than ten days thereafter. In the National Labor Relations Board Field Manual dated July, 1967, as amended, no deviation from the *Excelsior* rule is permitted even though both parties to the election proceeding may be willing to waive their rights under the rule (Field Manual, § 11312).

The Board claims that the rule is necessary to permit unions properly to present their side of the story to prospective members. They stress in *Excelsior* that it may be impossible for the unions to contact all of the employees, because of lack of names and addresses. Yet, in 1965, the last full year prior to *Excelsior*, 71.1 per cent of all elections conducted were in units comprised of less than 50 employees; 46.6 per cent were in units comprised of less than 20 employees (*cf.* Table 17, National Labor Relations Board 30th Annual Report). Again, in 1967, the first full year after *Excelsior* (*cf.* Table 17, National Labor Relations Board 32d Annual Report), 71.2 per cent of all elections were held in units consisting of less than 50 em-

ployees and 46.4 per cent of the elections were held in units consisting of less than 20 employees. It is submitted that in such small units there is no difficulty in ascertaining the names and addresses of all employees in the prospective unit, and, therefore, there is no justification for a *per se* rule applicable to all elections conducted by the Board.

There could be some justification for the *Excelsior* rule in large collective-bargaining units consisting of thousands of employees or employees widely scattered from a main or central office, but the establishment of the *per se* rule applicable to units of less than 20 or less than 50 clearly indicates that the primary intention of the Board is to assist union organizational activity, and not merely to provide better information to employees whom a union is attempting to organize.

A second premise upon which the Board promulgated the *Excelsior* rule is that the supplying of names and addresses will drastically curtail challenges of prospective voters at the election, and thereby eliminate much time and effort of the Board, and the parties to the election, in resolving these challenges following the election. In the *Excelsior* decision the Board set out this proposition in the following language:

> "With little time (and no home addresses) with which to satisfy itself as to the eligibility of the 'unknowns', the union is forced either to challenge all those who appear at the polls whom it does not know or risk having ineligible employees vote. The effect of putting the union to this choice, we have found, is to increase the number of challenges, as well as the likelihood that the challenges will be determinative of the election, thus requiring investigation and resolution by the Regional Director or the Board. Prompt disclosure of employee names as well as addresses will,

> we are convinced, eliminate the necessity for challenges based solely on lack of knowledge as to the voter's identity. Furthermore, bona fide disputes between employer and union over voting eligibility will be more susceptible of settlement without recourse to the formal and time-consuming challenge procedures of the Board if such disputes come to light early in the election campaign rather than in the last few days before the election when the significances of a single vote is apt to loom large in the parties' calculations. Thus, the requirement of prompt disclosure of employee names and addresses will further the public interest in the speedy resolution of questions of representation." 156 N.L.R.B. at 1243.

An analysis of the Board's own records clearly refutes this entire argument. Each year the National Labor Relations Board files its Annual Report with the President of the United States, the President of the Senate and the Speaker of the House of Representatives. In this report it reviews its activities for the prior fiscal year. In addition, it has statistical tables showing its various activities involving unfair-labor-practice cases and representation elections. Table 11A is entitled: "Elections in Which Certification Issued After Objections to Election Were Filed and/or in Which Determination of Challenges Was Required." One of the items in this table is "Challenges Only."

For the year ended June 30, 1965, the last fiscal year prior to the establishment of the *Excelsior* rule, the Board conducted 7,776 elections. Of this number, 312 elections involved "Challenges Only," which required resolutions subsequent to the election. Thus, in 1965, of the total elections the Board conducted, 4.01 per cent involved "Chal-

lenges Only," which had to be resolved by hearings subsequent to the election (30th Annual Report of the National Labor Relations Board, Table 11A).

In 1967, the first full fiscal year after the establishment of the *Excelsior* rule, the Board conducted 8,116 elections. Of this number, 371 elections involved "Challenges Only," upon which the Board was required to hold hearings. Of the total elections held in 1967, 4.57 per cent involved cases in which there were challenges that had to be resolved by post-election hearings (32d Annual Report of the National Labor Relations Board, Table 11A).

Despite the Board's concern for challenges, *supra*, it is clear from these figures that the improvement factor since the promulgation of the *Excelsior* rule is minus .56 per cent. It is submitted that the Board's concern for challenges is not substantiated by comparison with those cases involving challenges in 1965 and in 1967, where, indeed, the percentage of challenged cases increased following the promulgation of the *Excelsior* rule.

In the instant case there has been no finding that there was a lack of accessibility to the two unions involved towards the employees of the employer. Indeed, no such contention is made by the Board, nor can it be made. As a matter of actual practice, the Board included in its Direction of Election a demand that the *Excelsior* list be supplied (A. 11). This automatic application of the *Excelsior* rule is in defiance of the decisions of the Supreme Court cited herein.

B. The Excelsior Rule is Illegal inasmuch as it Promotes an Invalid Dual Standard of Conduct between Employers and Unions.

The Board dwells at great length on the value of the *Excelsior* rule in promoting better understanding of the

issues involved in a union election. It indicates that the *Excelsior* rule will facilitate a union in its communications with employees by mail, by telephone, and finally by visits to the employees' homes.

The Board fails to give the Court a proper picture of the situation as it exists as a result of the Board and court decisions between the rights, privileges and obligations of a union against the rights, privileges and obligations of an employer.

In an organizational campaign, a union has an absolute right to make any promises of benefits that it allegedly can gain from the employer. It has a somewhat limited but a very real right of harassment and coercion in obtaining employees' signatures on membership cards.

In contrast to this, an employer is under a statutory admonition proscribing such activities as promises, threats or coercion (*National Labor Relations Board* v. *Exchange Parts Co.*, 375 U.S. 405 (1964); *National Labor Relations Board* v. *Bailey Co.*, 180 F. 2d 278 (1950)). Indeed, it has now become a *per se* violation of the Act for an employer to visit the homes of his employees and to discuss union matters and union organizational activities (*Peoria Plastics Co.*, 117 N.L.R.B. 545 (1957)). It is an unfair labor practice for an employer to ask an employee whether or not he belongs to the union. It is an unfair labor practice for an employer to discuss union activities in the "Boss's office" (*cf. General Shoe Corporation*, 77 N.L.R.B. 124 (1948); 97 N.L.R.B. 499 (1951); *National Caterers of Virginia*, 125 N.L.R.B. 110 (1959)).

In promulgating the *Excelsior* rule, the Board in its militancy seeks to further the advocacy of unionism without justification or foundation in statutory authority given to it by Congress.

C. The Excelsior Rule is a Violation of Section 8(a)(2), and Section 302 of the National Labor Relations Act as Amended.

Section 8(a)(2) of the Act (29 U.S.C. § 158(a)(2)) reads as follows:

> "It shall be an unfair labor practice for an employer—
>
> ". . . to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . ."

Over the course of the years, the Board has consistently been zealous in prosecuting employers who show favoritism towards one union as against another or have in any way assisted a union in organizing its employees where only one union was involved. Its approach to these situations stems from the foregoing provisions of Section 8(a)(2) of the Act.

In 1961, in *A. O. Smith Corp.*, 132 N.L.R.B. 339, 48 L.R.R.M. 1340, the Board specifically stated:

> "We agree with the Trial Examiner that this act by the Company (furnishing employees' names and addresses to a Union) constituted illegal assistance."

The Board's ruling in that case was ultimately upheld by the Seventh Circuit, 343 F. 2d 103, 114 (1965). A similar conclusion was reached by the Ninth Circuit in *National Labor Relations Board* v. *L. Ronney & Sons Furniture Mfg. Co.*, 206 F. 2d 730, 734 (1953), in which the Court said:

> "Respondent's furnishing of a list of the names and addresses of its employees to the District Council of Carpenters (AFL) was an illegal act of assistance under § 8(a)(2) of the Act."

To the same accord see—

Hershey Metal Products Co., 76 N.L.R.B. 695, 21 L.R.R.M. 1237 (1948).

Wagner Iron Works, 104 N.L.R.B. 445, 32 L.R.R.M. 1104 (1953).

National Labor Relations Board v. *Wagner Iron Works & Bridge, Structural & Ornamental Iron Workers Shopmen's Local 471 (AFL)*, 220 F. 2d 126 (1955).

The effect of the Board's ruling in *Excelsior* and the continuing impact of the foregoing cases appears to place the Board in a completely incongruous dilemma. It is illegal and a violation of Section 8(a)(2) of the Act for an employer voluntarily to assist a labor organization by giving to it the information called for in *Excelsior*. However, if the Board sees fit to order such information to be given to the union, by some mystical wave of the wand, such information and assistance no longer violate Section 8(a)(2) of the Act. In effect, it is illegal for an employer to give this information on Monday and it is illegal for an employer not to give it on Tuesday.

In amending the National Labor Relations Act of 1947 (Taft-Hartley Act), Congress was seriously concerned about payments made by employers to representatives of their employees or to individuals seeking to obtain a representative position. As a result of this concern, it enacted Section 302 of the Act, which in pertinent part reads as follows:

> "(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend,

or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

"(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

"(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce;

. . . . . .

"(b)(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

. . . . . .

"(d) Any person who willfully violates any of the provisions of the section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both." (29 U.S.C. § 186.)

From the statutory language it is clear that the giving of a thing of value constitutes a criminal act under Section 302(a), and further that anyone who demands a thing of value from an employer for the use of any representative of his employees or any individual seeking to represent his employees comes in direct conflict with the criminal provisions of the Act (Section 302(b)(1)).

During the investigation of the objections to the conduct of the subject election, the Company categorically stated

that the giving of a list of the names and addresses of its employees to the Board, whose sole intention and purpose were to transmit said list both to the Boilermakers and to the Steelworkers, constituted a violation of the foregoing sections of Section 302 (A. 33). At that time the Company requested the Regional Director to hold a hearing to resolve the issue of whether or not such a list constituted a thing of value. The Regional Director did not see fit to hold such a hearing and, in effect, completely ignored this request.

When the Board, on December 27, 1966, served a subpoena duces tecum upon the Company, the Company then filed a motion to the Board requesting that the subpoena be quashed (A. 40-42). In this motion the Company again alleged that the list was a thing of value within the meaning of Section 302. Again the Company requested a hearing to determine whether or not the list constituted the giving of a thing of value, which request was completely ignored by the Board (A. 40-42).

It is, or it certainly should be, common knowledge of which this Court can take judicial notice that a list of names and addresses of individuals—a mailing list—is a thing of value. Mailing lists are compiled by mail advertising houses and are used for the distribution of mail on behalf of their customers. There are other corporations and businesses who make a very active and successful business of merely compiling such lists and renting or selling them to mail advertising houses (A. 67-101).

U.S. Representative Clement J. Zablocki, of the 4th District of Wisconsin, has been seriously concerned over the distribution of pornographic literature through the United States mails. Several years ago he submitted a bill in the United States Congress that, in effect, provided that all persons who deal in mailing lists must keep a record of the

uses to which these mailing lists were used; if a list were rented or sold, the individual who possessed the list must retain a record of these transactions; and his record would be subject to inspection by the United States Post Office Department (A. 53-65).

Again, in 1967, Representative Zablocki submitted a substantially similar bill (A. 53-65). In presenting his bill to Congress, Congressman Zablocki stated on the floor on February 9, 1967:

> "For example, in reviewing mailing list catalogues in my possession, I have found that a list of 918 pedigreed swine breeders can be had for $57.50, a list of 27 deaf missionaries for $8.00 and the names of 24 zwieback manufacturers for $10.50.
>
> "You may be pleased to know, Mr. Chairman, that $10.50 also will buy a list of 84 doughnut bakers living in your home state of Connecticut. And that a Senator's name and address sells for about 15 cents, while a member of the House is only worth a nickel.
>
> "If one so desires, he can obtain a list of 212,000 attorneys, 99,000 dentists, and 259,000 doctors—all for about $25 per thousand."

While Congressman Zablocki's purpose and intent is the elimination of pornographic literature from the United States mails, it is clear that a mailing list does constitute a "thing of value."

On September 24, 1966, the New Yorker Magazine, published by the New Yorker Corporation, New York City, New York, published an article directly dealing with the commercial nature of such mailing lists (A. 67-101).

There have been no Board or Court decisions as to whether or not a list such as the Board seeks here is a

"thing of value." The issue is raised for the first time. If it is a thing of value, the action which the Board demands is clearly within the proscription of Section 302. Indeed, a question is raised as to whether the Board and its agents have not already violated Section 302(b).

It is no answer to the Company's position that the unions would not sell this list. What the unions could or would do with it once it is beyond the employer's control is not a matter of issue before this Court. The sole problem that must be resolved is whether or not the list constitutes a thing of value; and, on this issue, the Company has twice requested both the Regional Director and the National Labor Relations Board itself to hold a hearing to determine the validity of its purpose, and in each instance the Company's request has been completely ignored. The Courts, in construing Section 302, have clearly held that the proscription in Section 302 not only applies to the giving of money, but is applicable to "anything of value," and it is clearly applicable to both the employer and the employees' representatives. *Cf. United States* v. *Roth*, 333 F. 2d 450 (1964), cert. den. 380 U.S. 942 (1965), and its companion case, *United States* v. *Holt*, 333 F. 2d 455 (1964). See also *United States* v. *Schabert*, 362 F. 2d 369 (1966); *United States* v. *Ricciardi*, 357 F. 2d 91 (1966); *United States* v. *Kramer*, 355 F. 2d 891 (1966).

The District Court, in its opinion in the instant proceeding (A. 101-106), gave only cursory attention to the question of whether or not a mailing list was a thing of value. In response to an admission during oral argument by counsel for the Board, in which he admitted that a mailing list could be a thing of value, the Court said: "The possible value of such a list as a mailing list gives this contention some surface plausibility" (A. 106). The Court then dismissed this contention with a reference to *Zentner* v. *Ameri-*

can Federation of Musicians of the United States & Canada &c., 237 F. Supp. 457 (1965).

It is submitted that the application of that decision to the present proceeding is inappropriate. The issue involved in *Zentner* was based upon the right of a union to have the names and addresses of all of its members as they traveled around the country in order that it might properly police its collective bargaining agreements and wage standards.

It can readily be recognized that a union must have the names of its members in order properly to police and administer its own business, but it is submitted that no union is entitled to such information prior to the time when it is the recognized collective bargaining representative of employees. Further, *Zentner* is inappropriate to the present proceeding.

D. The Excelsior Rule is Invalid because it Violates the Constitutionally Protected Right of Privacy of the Employees of the Company.

The Board's stated purpose in espousing the *Excelsior* rule is to turn the list of the names and addresses of the employees over to the union or unions involved so that the unions may directly contact the employees either by mail, by telephone, or by personal visits to the employees' homes.

The idea that an employer must give to strangers the names and addresses of his employees is repugnant to our democratic right of privacy. The Board's statement that its policy is based upon a desire that both sides be given an opportunity to present their positions is patently absurd and begs the question of its companion argument that the purpose of the lists is to minimize challenges at the time of the election. The statute is barren of any requirement of the nature of the *Excelsior* case.

This Court in *Griswold* v. *Connecticut*, 381 U.S. 479, 484-485 (1965), strongly protested the invasion of an individual's right of privacy. It said:

> "The Fourth and Fifth Amendments were described in *Boyd* v. *United States*, 116 U. S. 616, 630, as protection against all governmental invasions 'of the sanctity of a man's home and the privacies of life.' We recently referred in *Mapp* v. *Ohio*, 367 U. S. 643, 656, to the Fourth Amendment as creating a 'right to privacy, no less important than any other right carefully and particularly reserved to the people.'"

The Board's desire irresponsibly to publish the names and addresses of the employees is in direct conflict with the holding of this Court in *National Association for the Advancement of Colored People* v. *Alabama*, 357 U.S. 449, 462 (1958), wherein the Court said:

> "We think that the production order [for the names of the members of the NAACP in Alabama] . . . must be regarded as entailing the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association."

It should be remembered that in the *Alabama* case the list of names and addresses was to be turned over to the state Attorney General for his use, and his use only. Certainly, it is a far cry from that situation to the situation where the Board intends, and proudly proclaims, that it will turn over the list to union officials for whatever purpose they seek to obtain.

One of the major bases upon which the Board founds its *Excelsior* decision is the fact that the giving of such lists will assist the Board and the parties to the election in re-

solving the eligibility of the employees to vote. The Board has for a long period of time required the employer, several days prior to the election, to submit to it a list of eligible voters. This list is then reviewed by the union or unions involved to determine whether the list is correct. The Board admits that on September 26, 1966, the employer did in fact submit such a list to the unions involved and the list was thoroughly reviewed by representatives of both unions (A. 32). However, the Board would have the Court believe that this is insufficient and that failure to supply to the unions both names and addresses of employees will cause numerous challenges when employees exercise their right to vote. This is a completely false and unwarranted assumption and is denied by the Tally of Ballots. The Tally indicated that of a total number of eligible voters of some 1,750, there were exactly 6 challenges. The number of ballots that were challenged in the election of September 29 amount to less than 0.5 per cent. It is clear, therefore, that the challenged ballots could in no way affect the results of the election; and it is further clearly demonstrated that the Company's failure to supply the *Excelsior* list in no way affected the number of challenges in the election."

IV.

The Unions had Adequate Means and Alternative Methods of Ascertaining the Employees' Names and Addresses.

The election conducted on September 29, 1967, was the fifth such election in which the Boilermakers had sought to gain recognition of the Company's employees (A. 101). During this period of time, the Boilermakers have constantly maintained an office and a staff in Worcester, Massachusetts. They have consistently subjected the Com-

pany's employees to organizational campaigns and requests for membership in their union. It would be completely naïve to presume for a moment that the Boilermakers during this period of time could not have established contact with each and every employee of the Company.

Over the course of the years, the Boilermakers, in addition to the usual organizational activity of distributing handbills and leaflets at the Company gates, have had innumerable meetings in and around Worcester. During past organizational campaigns, the Boilermakers have printed ads in the local Worcester newspapers. They have broadcast radio appeals on the local Worcester radio stations. In fact, during one campaign they published a telephone number which could be called by the employees of the Company to receive propaganda appeals during the day and night. This so-called "hot line" was carried out over an extended period of time and with full knowledge not only of all Wyman-Gordon employees but indeed of all the citizens of the Worcester area. Upon such a showing of ingenuity and initiative, it ill becomes the Board at this date to state that it is necessary that the Boilermakers receive from the Company a list of the names and addresses of the Company's employees.

In regard to the Steelworkers, and with equal application to the Boilermakers, there is available to anyone with the initiative to use it a City Directory of the Metropolitan Worcester area. This Directory can be purchased by anyone who desires to do so or it can be inspected in the Worcester public libraries by anyone who does not wish to pay the purchase price.

The City Directory lists all individuals living in metropolitan Worcester and indicates not only their home addresses but also their employer and the position which they hold with the employer (A. 50-52).

It is clear from the foregoing that the unions here had available to them sufficient sources of information in order actively to affect the type of campaign which the Board contemplates under the *Excelsior* rule. The failure of the unions to make use of these readily available, and varied and multiplicity of approaches does not warrant the implications imposed upon the employer in *Excelsior*.

Conclusion.

It is respectfully submitted that this Court should affirm the Court of Appeals in holding that the *Excelsior* rule is invalid because of the Board's failure to comply with the Administrative Procedure Act; and further that this Court should find that the *Excelsior* rule itself is invalid as exceeding the statutory authority of the Board to establish the rule and to enforce it through the subpoena powers of the District Court, or, in the alternative, to remand the case to the Court of Appeals for a ruling on the substantive issues presented, upon which the Court of Appeals failed to rule.

Respectfully submitted,

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February 12, 1969.

Appendix.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 7000.

WYMAN-GORDON COMPANY ET AL.,
APPELLANTS,
v.
NATIONAL LABOR RELATIONS BOARD,
APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[270 F. Supp. 280]

Before ALDRICH, *Chief Judge*,
McENTEE and COFFIN, *Circuit Judges*.

Quentin O. Young, with whom *Herrick, Smith, Donald, Farley & Ketchum* was on brief, for appellants.

Solomon I. Hirsh, Attorney, with whom *Arnold Ordman*, General Counsel, *Dominick L. Manoli*, Associate General Counsel, *Marcel Mallet-Prevost*, Assistant General Counsel, and *Bernard Dworski*, Attorney, were on brief, for appellee.

June 12, 1968.

ALDRICH, *Chief Judge*. This is an appeal from an order of the district court enforcing compliance with a National Labor Relations Board subpoena which ordered an em-

ployer to furnish names and addresses to its employees. The issuance of the subpoena stems from efforts of two unions, the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO (Boilermakers), and the United Steelworkers of America, AFL-CIO (Steelworkers), to represent some 1750 production and maintenance employees at appellant's plants in three Massachusetts communities. The Board's Regional Director, after investigation and hearing, ordered an election and directed appellant, in accordance with the rule announced in *Excelsior Underwear, Inc.*, 1966, 156 N.L.R.B. 1236, to furnish the Board a list of the names and addresses of all employees eligible to vote. Appellant agreed to furnish a list of names, but refused to supply addresses. Notwithstanding this refusal, the election was held, resulting in 226 votes for the Boilermakers, 555 for the Steelworkers, and 903 against any union.

On objection by both unions, the Regional Director set aside the election and ordered a new one. The Board affirmed this decision. Again the Regional Director demanded an *Excelsior* list, and again appellant refused. The subpoena then issued. The Board filed a complaint seeking enforcement of the subpoena or, alternatively, a mandatory injunction directing appellant to comply with the *Excelsior* requirement. The district court ordered enforcement of the subpoena, and this appeal followed. By it appellant has launched a broadside attack against the *Excelsior* rule, challenging its substance, the procedure of its promulgation, and the statutory basis of the subpoena power invoked to enforce it.

The court is of one mind in not being greatly impressed by the arguments challenging the wisdom of the *Excelsior* rule, but this is a matter on which the majority of the court does not feel called upon to make a decision. We mention briefly the Board's concern in insuring an in-

formed employee electorate, and in balancing management's right of access to employees in the plant through the mails with a right on the part of unions—and anti-union employees—to have access to the addresses of a constantly changing roster of employees. It is unnecessary to repeat the Board's responses in *Excelsior* to the contentions that its authority to compel disclosure is limited to cases where other channels of information do not exist and that such compulsory disclosure invades the privacy of employees. Likewise we are not greatly impressed by the contention that compelling a list of names and addresses forces appellant to "interfere" with a labor organization, in violation of 29 U.S.C. § 158(a)(2), and to give a "thing of value" to a labor organization, in violation of 29 U.S.C. § 186. The former statute, as is indicated by the cases cited to us by appellant, is concerned with acts of favoritism. It is difficult to think that supplying the Board with information, pursuant to a Board order, which the Board will give to all persons alike who show a legitimate interest, would be considered a proscribed gift.

A threshhold question, however, is raised by appellant's claim that the *Excelsior* rule is invalid because, concededly, it was promulgated in disregard of the notice and publication requirements of the Administrative Procedure Act, 5 U.S.C.A. §§ 552, 553.[1] In the opinion of the majority of the court this issue is determinative.

Events leading to the establishment of the rule grew out of two consolidated cases coming before the Board

[1] We are not here concerned with the effect of failure to publish rules, themselves properly arrived at, in compliance with 5 U.S.C.A. § 552(a)(1). In this respect we agree with the views of Judge Friendly speaking for the court in *United States* v. *Aarons*, 2 Cir., 1962, 310 F.2d 341, 347-48, that such rules are valid as against one with actual notice of them. See 1 Davis, Administrative Law § 6.10 (1958).

on union challenges of elections on the ground that the employers had refused to supply the unions with lists of names and addresses of employees so that the unions might answer a campaign letter sent by the company to the employees. Recognizing the problem to be one affecting more than just the parties before it, the Board chose to solicit the assistance of selected amici curiae, and, ultimately, to establish a rule which not only did not apply to the parties before it, but did not take effect for thirty days.[2] In so doing we consider that the Board, to put it bluntly, designed its own rulemaking procedure, adopting such part of the Congressional mandate as it chose, and rejecting the rest.

In presently justifying its position the Board does not seek to carve out for itself the special defense suggested by our brother Coffin in dissent, but asserts that what it did was proper administrative action approved by the Court in *SEC* v. *Chenery Corp.*, 1947, 332 U.S. 194. It is, of course, true that the Court there recognized that an adjudicatory administrative body may promulgate rules through decision as well as through more formal rulemaking procedures. This is a necessary and inevitable consequence of adjudication. Normally the Board must decide cases between party and party, as the Commission did in *Chenery*. The result, if stare decisis is to mean anything, is that any principle, once decided, stands as a guide for the future and may be spoken of as a rule. Examples are legion. Sometimes, until the Board spoke, all parties may have thought the "rule" was the other way. This may be unfortunate, but it is normally unavoidable, as *Chenery* demonstrates.

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[2] Thirty days is the period which must elapse between publication and effective date of a rule promulgated in accordance with APA procedures. 5 U.S.C.A. § 553(d).

In *Excelsior*, however, the Board did not decide a case between party and party, or, more exactly, it decided a case one way, and took occasion to lay down a future rule the other way. *Chenery* in no fashion suggests approval of this. On the contrary, to the extent the Board was not deciding a case, this is precisely where Congress had instructed it as to the procedure it should adopt. The Board has chosen to disregard Congress.

Although the first time in this circuit, this is neither the first nor the most severe instance of Board action approximating contravention of the APA in this manner. It has been long and severely criticized, *e.g.*, Peck, The Atrophied Rule-Making Powers of the National Labor Relations Board, 70 Yale L.J. 729 (1961); 1 Davis, Administrative Law § 6.13 (Supp. 1967), with no apparent effect. We regret that the matter comes before us in connection with a rule to which we see little or no objection and for which there is much to be said. Yet, to blink at this procedure in this instance because we may approve of the result, we believe would be neither honest nor wise.[3] Congress provided no exception in the APA for rules improperly promulgated, but which some court, in a case between the agency and some individual, was persuaded were sound. To recognize such an exception would be to emasculate the statute.

We read Judge Coffin's dissent as disagreeing on this matter only in that he believes the rule promulgated to be "procedural" within the APA definition and therefore not

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[3] We are not unmindful that two circuits have supported the *Excelsior* rule. *NLRB* v. *Rohlen*, 7 Cir., 1967, 385 F.2d 52; *NLRB* v. *Hanes Corp.*, 4 Cir., 1967, 384 F.2d 188, *cert. denied* 390 U.S. 950. However, so far as appears, the Board's failure to comply with the APA was not brought to the courts' attention. The courts were concerned with whether the substance of the rule was within the Board's rule-making power, not whether it was properly adopted.

subject to the requirement that advance notice of the intended rulemaking, and the substance of the rule, be given and that interested parties be afforded an opportunity to comment. 5 U.S.C.A. § 553. If the rule related simply to the mechanics of conducting an election, to superintending or checking the voters, we would agree. The *Excelsior* opinion makes the suggestion that this is one of the purposes. 156 N.L.R.B., *supra,* at 1242-43. However, the Board's decision effectively contradicts its own declaration. The Board already had a valid rule requiring the employer to furnish a checklist. The additional requirement of the *Excelsior* rule is expressly stated not to apply when the time interval is "too brief . . . for the union to be able to make any meaningful use of this information." *Id* at 1242, fn. 14. We can only conclude that *Excelsior's* purpose is what it appears to be on its face, a provision requiring the employer to furnish interested parties with affirmative assistance in conducting their election campaigns.

Such assistance is substance, not Board procedure. It differs only in degree and not in kind from a requirement, for example, that an employer having an assembly hall or a printing press should make it available to groups requesting it. The Board's contentions that furnishing a mailing list is not expensive or seriously burdensome, or is required only because the union has no effective substitute, may well be justifications for the rule, but they do not change its character. Judge Coffin's emphasis on the relative lack of burden, and comparing the compilation of the list with affording space on a bulletin board, suggests factual determinations in each case that seem to us unnecessary at best. His desire to resolve questions of doubt in favor of a procedural label loses importance to us when one considers that its only purpose is to avoid affording interested parties an opportunity to present their views as to what is, quite apparently, a controversial rule.

It is also true that compliance with the rule may well increase the fairness of the election. This, however, is a conclusory argument. Many actions by the employer may add to the fairness of the election. This does not mean that ordering them to be done is procedural. We are particularly unmoved by our brother Coffin's suggestion that the fact the rule sets up a positive as distinguished from a negative requirement is indicative that it is not substantive.

The judgment of the district court is set aside and the court is ordered to dismiss the complaint.

COFFIN, *Circuit Judge* (dissenting). For the purpose of deciding the applicability of the notice provision of the Administrative Procedure Act, 5 U.S.C.A. § 1003(a), I view the *Excelsior* rule as procedural and thus valid despite absence of advance notice. I recognize that this is a ground not relied on by the Board, which seemed to assert a standard defense to a standard assault. But the same shoe fits both parties, for the distinction which divides this court was obviously far from the concern of appellant, which said in its brief, ". . . . it is clear the Board recognized that it was establishing a new rule or procedure in the conduct of election proceedings under Section 9 of the Act."

The legislative history suggests to me that in grey areas doubt about the nature of a rule should be resolved in favor of applying the procedural label. In the first place, the few attempts to define terms equate substantive rules with "rules issued pursuant to statutory authority to implement statutory policy, as by fixing rates or defining standards", Attorney General's Manual on the A.P.A. (1947) 13 n. 5, or with rules "other than organizational or procedural . . . which implement the statute, as, for example, the proxy rules issued by the Securities and Exchange Commission pursuant to . . . 15 U.S.C. 78n." Manual, *supra* at 30. I

read the language and these examples as giving restrictive rather than expansive meanings to "substantive rule".

In addition, the Senate Committee on the Judiciary made clear that in exempting procedural rules from the notice requirement it was seeking to encourage such rules because "those types of rules vary so greatly in their contents and the occasion for their issuance that it seems wise to leave the matter of notice and public procedures to the discretion of the agencies concerned." Legis. Hist. of the A.P.A. (1946), 18, 313.

The *Excelsior* rule itself seems to me to be clearly on the procedural side. It sets up a positive requirement of furnishing addresses as well as names of employees, to be applicable in every election. In this respect it differs from the proscription of selectively directed acts of coercion which are more appropriately accomplished through the unfair labor practice procedures.

That the requirement looks toward action the effect of which reaches beyond relations between a party and the Board ought not to be a controlling consideration, any more than it is with reference to the requirement in 29 C.F.R. § 101.19 (the Board's "Statements of Procedure" governing elections) that elections "be adequately publicized by the posting of official notices in the establishment. . . ." Indeed, the natural home of the *Excelsior* rule would seem to be in § 101.19.[1]

It is also, I think, a factor of relevance to the substance vs. procedure issue that the burden on the employer's time,

[1] All of this only refers to the primary objective of *Excelsior*, to achieve better elections. The fact that a secondary purpose, the expeditious handling of challenges of voter eligibility, is uncontrovertedly procedural is an added factor of some significance. While a procedural secondary rule could not save a rule otherwise clearly substantive, it would seem that a primary purpose of ambiguous effect might be aided, insofar as notice is concerned, by such a secondary purpose.

efforts, or property in being compelled to furnish addresses of employees is inconsequential. I do not share the court's conclusion that this requirement "differs only in degree and not in kind" from one that would force an employer to make an assembly hall available on request. I would say that we are dealing with a dichotomy where difference in degree can result in a difference of kind or difference in categorization. This, I think, is illustrated by the above noted procedural requirement that notices of election be posted "in the establishment"—in itself a minimal encroachment on the employer's domain.

While it may be that forcing employers to share with unions their previous monopoly on knowledge of addresses may have a net result of strengthening union power generally, such a result cannot be said to alter substantive "rights" unless the employer's prior easy access to addresses rises to the dignity of a right. *Cf. Sibbach* v. *Wilson*, 312 U.S. 1, 14 (1941). Moreover, the *Excelsior* rule by its terms applies to "all parties"—which include employees hostile to a new union or seeking decertification of an old one. *Cf. Wallace Murray Co.*, 1968-1 CCH NLRB Dec. ¶ 22,256.

I would, for the above reasons, hold that the *Excelsior* rule was valid. But this would not have been an end to the case. There remains the difficult question—how, if at all, can *Excelsior* be properly enforced?[2] The district court ordered that the subpoena be honored. The Board's power lies in the statutory language granting "the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. . . ." 29 U.S.C.A. § 161(1).

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[2] While what follows goes beyond the issue which divides the court, the writer feels obliged to explore the problem of enforcement which has led to conflicting and often strained statutory interpretation.

The authorities which have upheld the subpoena power as available to procure an *Excelsior* list [3] have defined the proceedings leading to representation certification as an investigation and have tortured the concept of "evidence" into something which is helpful in "facilitating a fully informed electorate". *NLRB* v. *Rohlen, supra* at 57. A scrutiny of 29 U.S.C.A. § 161 yields the impression that "evidence" is used throughout in its more traditional sense as data relevant to the proof of a fact in issue.[4] I am sympathetic with the courts which have not been willing to make this leap. *NLRB* v. *Q-T Shoe Co.*, Civil No. 140-67 (D. N.J., filed Jan. 19, 1968); *NLRB* v. *Montgomery Ward, Inc.*, 54 CCH Lab. Cas. ¶ 11659 (M.D. Fla. 1967).

A second solution, suggested by *Q-T Shoe Co., supra,* is that the only way to enforce the *Excelsior* rule is first to secure a determination that refusal by an employer to pro-

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[3] *NLRB* v. *Rohlen,* 385 F.2d 52 (7th Cir. 1967); *NLRB* v. *Hanes Corp.*, 384 F.2d 188 (4th Cir. 1968), *cert. denied* March 4, 1968; *NLRB* v. *British Auto Parts,* 266 F. Supp. 368 (C.D. Cal. 1967); *Swift* v. *Solien,* 56 CCH Lab. Cas. ¶ 12140 (E.D. Mo. 1967); *NLRB* v. *Teledyne, Inc.*, 56 CCH Lab. Cas. ¶ 12229 (N.D. Cal. 1967); *NLRB* v. *Beech-Nut, Inc.*, 56 CCH Lab. Cas. ¶ 12237 (S.D. N.Y. 1967).

[4] A similar approach would be to define more narrowly the particular "investigation" as the quest for the names and addresses of the employees. With this frame of reference, the list of such names and addresses could be considered more traditionally as "evidence" relevant to the proof of the object of the investigation. Indeed the subpoena served on appellant contemplated a hearing before the Regional Director at which appellant's president was to testify from corporate books and records concerning the names and addresses of employees. In lieu of such books, a list would be received but only after Board agents had "verified its contents by examination of the subpoenaed books and records". In short, the list is arguably evidence tending to establish the true names and addresses being sought. The difficulty with this approach is that it tortures the word "investigation" into something quite different from its use in 29 U.S.C.A. § 159.

vide a list of names and addresses of employees constitutes an unfair labor practice under 29 U.S.C.A. § 158(a)(1), and then to seek the aid of the court under 29 U.S.C.A. § 160(e). This would seem plausible until the statutory definitions of unfair labor practices are examined. The Board in *Excelsior* wisely refrained from saying whether refusal to disclose names and addresses of employees would constitute "interference, restraint, or coercion" within the meaning of 29 U.S.C.A. § 158(a)(1). I would say that it is at least doubtful that any one of the effective verbs would cover such a case. "Interfere" is the most adaptable, but its entire thrust is aggressive, not passive. According to Webster's International Dictionary (3d int. ed. 1961), it means such things as "intervene", "intermeddle", and "interpose".

It cannot be said with assurance that a refusal to respond to the *Excelsior* rule—unless, perhaps, a repeated refusal—would predictably be denominated an unfair labor practice.[5] Moreover, constant litigation would ensue over the issue whether, in a given case, the refusal to provide a list had any effect at all on the representation proceeding. For example, in the case at bar appellant moved to quash the subpoena, citing as one ground that the unions already had employee mailing lists.

This leads to the remaining mode of enforcing the rule, if indeed there is any way at all. This is the injunction. The Congress has indicated by statute that the Board has authority to prescribe "regulations and rules of decision" governing consent elections. 29 U.S.C.A. § 159(c)(4). The Supreme Court has made it clear that "The control of the election proceeding, and the determination of the steps

[5] I would add that I would prefer some lesser sanction for enforcement of procedural rules than that stemming from an unfair labor practice proceeding.

necessary to conduct that election fairly . . . [are] matters which Congress entrusted to the Board alone." *NLRB* v. *Waterman S.S. Corp.*, 309 U.S. 206, 226 (1940).

While there is a step between statute and rule, not present in *United States* v. *Feaster*, 330 F.2d 671 (5th Cir. 1964), I see no difference in principle. If, in *Feaster*, the statutory right to have access to books and records supported an injunction compelling access to names, addresses, and job classifications of employees, so here a rule predicated on statutory authority to regulate elections and carrying out Congressional policy should support the same remedy. Or, to go back to the observation in *Walling* v. *Brooklyn Braid Co.*, 152 F.2d 938, 941 (2d Cir. 1945), we should "consider whether the injunction is reasonably required as an aid in the administration of the statute, to the end that the Congressional purposes underlying its enactment shall not be thwarted."

Assuming, therefore, the validity of the *Excelsior* rule, I see no other certain way in which it can be enforced than by injunction. And while the absence of other remedy is no adequate justification for judicial invention, I feel that enforcement of the rule lies well within the equity powers of the district court. I would therefore remand the case for consideration of the Board's alternative prayer for an injunction.